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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 1551

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The above-named petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on December 19, 1969, rehearing denied February 16, 1970.

OPINIONS BELOW

The opinion of the District Court (Appendix B) is reported at 296 F. Supp. 507 *sub nom.** *Transportation-Communication Employees Union v. St. Louis-San Francisco Railway Co.* The opinion of the Court of Appeals (Appendix E) is reported at 419 F. (2d) 933.

JURISDICTION

The original judgment of the Court of Appeals (Appendix F) was entered December 19, 1969. A Petition for Rehearing was denied February 16, 1970 (Appendix G). Jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1) and Section 3 First (q) of the Railway Labor Act (45 U. S. C., § 153 First (q)).

QUESTIONS PRESENTED

1. Whether, in a proceeding in a District Court under Section 3 First (q) of the Railway Labor Act (45 U. S. C. A., § 153 First (q)) to review and set aside certain awards of a Special Board of Adjustment established under Section 3 Second of that Act, and a counterclaim by the union under Section 3 First (p) of the Act to enforce those awards, in which proceeding the Court did not grant the motion of either party for summary judgment but on its own initiative entered a Judgment remanding the dispute to the Special Board to take further action, without the Court retaining jurisdiction, such judgment was appealable to the Court of Appeals under 28 U. S. C. A., § 1291 and Section 3 First (q) of the Railway Labor Act (45 U. S. C. A., § 3 First (q))?

---

* After the commencement of this action, the original plaintiff, Transportation-Communication Employees Union, merged with the Brotherhood and became the Transportation-Communication Division of the Brotherhood.

2. Whether, if after an appeal was taken from such judgment, and after oral argument but before decision in the Court of Appeals, the parties settled the underlying controversy and filed a joint suggestion of mootness and a joint motion in the Court of Appeals to vacate the judgment of the District Court and to remand the case to that Court for dismissal as moot, the Court of Appeals had jurisdiction to entertain such motion?

3. Whether, in a proceeding before a Special Board of Adjustment established under Section 3 Second of the Railway Labor Act, in which the Union claims the Railroad violated their collective bargaining agreement when it assigned certain work to employees in other crafts and the Railroad claims that no craft is entitled to perform such work, and no other union had claimed the right to perform such work, the decision of this Court in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U. S. 157, requires the Board on its own initiative to take affirmative steps to determine whether any other union wants to claim that its craft is entitled to perform such work?

STATUTES INVOLVED

The provisions of Subsections 3 First (p) and (q) of the Railway Labor Act (45 U. S. C. A., § 3 First (p), (q)) and Subsection 3, Second of that Act (45 U. S. C. A., § 153 Second) and of 28 U. S. C. A., § 1291, are set forth in Appendix A).)

STATEMENT OF THE CASE

This case began with a complaint by the Petitioner ("Union") against the Respondent ("Railroad") on an unrelated matter (R. 133). The Railroad filed an answer to the complaint and a permissive counterclaim in the nature of a Petition for Review under Section 3 First (q) of the Railway Labor Act seeking to set aside certain awards of a Special Board of Adjustment (the "P. L. Board") established by the parties under the second paragraph of Section 3 Second of the Act (R. 5). The parties settled their dispute which was the subject of the complaint, and with the consent of the parties the complaint was dismissed without prejudice and with the Railroad's counterclaim unaffected (R. 2; App. B, p. A-6). The union filed a counter-counterclaim under Section 3 First (p) of the Railway Labor Act seeking enforcement of the questioned awards of the P. L. Board (R. 63). The awards sustained claims of the Union that the Railroad violated their collective bargaining agreement when it assigned certain work to employees in various other crafts.

The parties filed cross motions for summary judgment and briefs (R. 135; App. B, pp. A-7–A-8). The Railroad argued that the awards were invalid because they changed rather than interpreted the collective bargaining agreement and should be set aside. The Union argued that the Awards interpreted the agreement and should be enforced in accordance with this Court's decision in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257, and the amendments to Sections 3 First (m) and (p) of the Railway Labor Act effected by Public Law 89-456 (45 U. S. C. A., § 153 First (m), (p), 1970 Supp.). Neither side suggested that this Court's decision in *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U. S. 385, had any bearing on this case.

After oral argument in the District Court, the District Judge inquired by telephone of counsel for the parties whether the *Union Pacific* case had any bearing on this case. Both counsel replied that they thought the *Union Pacific* case had no bearing, and the Court asked them to state their position to him in writing. They did so, the Railroad stating that that case had no application because no other union had ever claimed the right to have employees in its craft perform the work (R. 146) and thus the "third party issue" was not presented, and the Union stating that that case had no application because the Railroad did not contend that any other craft was entitled to the work nor was any other craft claiming it (R. 148-49).

The District Court then issued a Memorandum sustaining the position of the Union on the merits of the awards (R. 134-40; App. B, pp. A-6–A-13), but holding that the *Union Pacific* decision of this Court required the Board, before making an award, to ascertain what other unions "may" have an interest in the matter, to give such other unions an opportunity to be heard, and to review all the union contracts to interpret the scope of all of them (even though there was no dispute or claim pending concerning any other contract) (App. B, pp. A-13–A-14; R. 140-42). The same day it entered a Judgment incorporating its Memorandum and remanding the case to the P. L. Board for further determination in accordance with the Memorandum (App. C; R. 142).

The Union appealed (R. 153). After the oral argument in the Court of Appeals the parties settled the underlying disputes and filed in that Court a joint suggestion of mootness and a joint motion to vacate the judgment of the District Court and to remand the case to the District Court to dismiss it as moot (App. E, p. A-20). The Court of Appeals held (by a divided Court) that the Judgment

of the District Court was not a "final decision" within the meaning of 28 U. S. C. A., § 1291, and hence not appealable (App. E, pp. A-20–A-21). It held further that since the Judgment was not appealable it had no jurisdiction to grant the joint motion (App. E, p. A-20). The dissenting opinion was of the view that the awards were proper and should have been enforced, that 28 U. S. C. A., § 1291 should not be construed to prevent a review of the District Court's order, and that the joint motion to vacate and remand for dismissal should have been granted (App. E, p. A-21).

The jurisdiction of the District Court to entertain the original complaint was invoked under 28 U. S. C. A., § 1337 (R. 133; App. B, p. A-6). The jurisdiction of the Court to entertain the Railroad's counterclaim was invoked under 45 U. S. C. A., § 153 First (q) of the Railway Labor Act (R. 6). The jurisdiction of the District Court to entertain the Union's counter-counterclaim was invoked under 45 U. S. C. A., § 153 First (p) (R. 63).

REASONS FOR GRANTING THE WRIT

I. This Case Involves an Important Question of Law Under the Railway Labor Act That Has Not Been But Should Be Decided by This Court, i. e., Whether a Judgment of a District Court Remanding an Award to an Adjustment Board, Permitted by the Recently Enacted Section 3 First (q) of the Railway Labor Act, Is an Appealable Decision.

Prior to the 1966 Amendments to the Railway Labor Act, the only judicial review of an award of the Adjustment Board was in an action to enforce the award if the carrier did not comply with it. In such an action, the District Court was authorized "to enforce or set aside the order of the division of the Adjustment Board", 45 U. S. C. A., § 153 First (p). Any such judgment was of course appealable under 28 U. S. C. A., § 1291.

In 1966 Public Law 89-456 added an additional method of review and an additional type of judgment that could be rendered. The new Section 3 First (q) provides for "a petition for review" in a District Court by an employee or carrier aggrieved by an award. In such an action the Court is authorized "to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division. . . ." In *Transportation-Communication Employees' Union v. Union Pacific*, 385 U. S. 158 (1966), this Court held (at 165, fn. 4) that the newly authorized judgment of remand was proper in an enforcement action as well as on a petition for review.

But whatever the form of the judgment, the new subsection (q) provides that it

> ". . . shall be subject to review as provided in Sections 1291 and 1254 of Title 28, United States Code".

Section 1291 provides for review of the judgment by appeal to the appropriate United States Court of Appeals. Yet the Court below held that when the judgment is in the form of a remand it is not appealable under Section 1291, even though such judgment is erroneous and even though, as in this case, it erroneously refused to grant enforcement of the award. The dissenting judge below dissented on both grounds; he dissented because he thought the awards were proper and should have been enforced and because he thought Section 1291 should not be construed to preclude review of the District Court's order under the circumstances of this case. He noted that after the oral argument in the Court of Appeals the parties settled the underlying dispute and filed a joint suggestion of mootness and a joint motion to vacate the judgment of the District Court and to remand the case to that Court with directions to dismiss as moot. He would have granted the motion. The majority opinion, based on inapposite authority, held that since in its view the appeal was improperly taken the Court did not have jurisdiction even to enter the requested order.

The question of the appealability of a judgment of remand in an enforcement action or on a petition for review, first made available in the 1966 amendments of the Railway Labor Act, presents an important and novel question which should be, but has not been, decided by this Court. Cf. *Rothensies v. Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946); *American Federation of Musicians v. Wittstein*, 379 U. S. 171, 174-75 (1964).

We believe this is the first case in which a Court of Appeals held that a judgment of a District Court that refused to enforce an Adjustment Board award and instead remanded it to the Board, was not appealable. Before the 1966 amendments, any judgment in an action on an award, enforcing it or refusing to enforce it, was unquestionably

appealable. But under the decision below, if a judgment refuses to enforce an award and remands it, but does not say in so many words that it refuses to enforce it, the judgment is not appealable. But a judgment of remand is just as effective a denial of enforcement as a judgment that says it denies enforcement. Whether a denial of enforcement is appealable should not turn on the language the judgment happens to contain, but on its effect. See esp. *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 152-54 (1964) and *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962).

If the decision below stands, a new way has been found to deny enforcement of Adjustment Board awards, contrary to the intent of Congress in amending Subsections 3 First (m) and (p) of the Railway Labor Act in 1966 and what was thought to have been decided by this Court in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965). Under the majority opinion below, all the District Court need do is to deny enforcement of an award by remanding it, and such judgment is not reviewable even if contrary to law and the law required the award to be enforced. Such posture of the law would not be sensible, especially in a situation like here where the District Court completely disposed of the case before it and did not even purport to retain jurisdiction to do anything but execute its judgment. Certainly there is no provision in the Railway Labor Act, especially in view of the last sentence of Subsection 3 First (q), to indicate that Congress intended to deprive a beneficiary of an Adjustment Board award of appellate review of a judgment that refuses to enforce the award.

Nor could the District Court properly have retained jurisdiction. If, after the remand to the Board, the Board should render an award different from its initial award, the Union would have the right under Section 3 First (q)

to file a "petition for review" "in any United States District Court in which a petition under paragraph (p) [an enforcement action] could be filed". Under paragraph (p) such petition may be filed "in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates . . ." No District Court has the right to deprive a petitioner of such choice of venue by arbitrarily retaining jurisdiction of an antecedent action, nor did the District Court in this case purport to do so. It completely disposed of the action before it.

II. The Decision Below, Holding That a District Court Judgment Refusing to Enforce or Set Aside Adjustment Board Awards and Remanding the Dispute to the Board for Further Proceedings and Terminating the Case in the District Court, Is Not an Appealable Order, Is Unprecedented and Frustrates the Holding of This Court in the Gunther Case and Frustrates 1966 Amendments to the Railway Labor Act.

In *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965), this Court definitively held that awards of the National Railroad Adjustment Board were to be enforced unless (at 261) they were "wholly baseless and completely without reason".

The following year, by enacting Public Law 89-456, Congress amended Sections 3 First (m) and 3 First (p) of the Railway Labor Act (45 U. S. C. A., §§ 153 First (m) and (p)) to make all awards of the Board and a P. L. Board for which it first provided in Section 3 Second, regardless of whether they contain money awards, "final and binding", and to provide that in an action to enforce an award "the findings and order of the division of the Adjustment Board shall be conclusive on the parties". It lim-

ited judicial review only to certain jurisdictional defects and fraud, and, according to Senate Report 1201 to accompany H. R. 706, 89th Cong., 2d Sess., p. 3, to determining whether an award was "actually and indisputedly without foundation in reason or fact".

The District Court found the awards unassailable on the merits within the above-quoted standards, but thought the Board had not followed the correct procedure. It entered its "Judgment" (R. 142; App. C, p. A-15) remanding the disputes to the Board for the Board to follow additional procedures. It did not retain jurisdiction of the case for any purpose. There was nothing left for the District Court to do except execute its judgment requiring notice to other unions and to make an interpretation "of all the contracts" (R. 142; App. B, p. A-14). The only proper issue on appeal was whether the awards should be enforced or whether the remand was correct. The appeal was not a piecemeal appeal; it would decide the entire case. And the Court below, by a divided Court, found such judgment not appealable, even if it was erroneous.

Such combination of holdings, if permitted to stand, invents a new way to defeat the finality and conclusiveness of awards. By the simple device of refusing to enforce awards and remanding them to the Board, *even if such remand is erroneous and the awards should have been enforced* (as the dissenting Judge below thought they should have been), since appeal is denied the intent of Congress in enacting Public Law 89-456 and, we believe, of this Court's decision in the *Gunther* case, is frustrated. Such circumvention of what by now is abundantly clear was the intent of Congress and this Court's decision in the *Gunther* case and earlier cases, should not be permitted to continue and expand. And expand it will, unless corrected. The decision below is already being relied upon, in a case now pending in the Seventh Circuit, for an order not being

appealable in which the District Court denied enforcement of an award and remanded it to the Adjustment Board because the District Judge thought the arbitrator should consider certain evidence which the arbitrator thought should not be considered. *United Transportation Union v. Illinois Central Railroad*, No. 18,033; the decision of the District Court in the case, *sub nom. Brotherhood of Railroad Trainmen v. Illinois Central R. Co.*, is reported at 72 LRRM 2877, not otherwise reported.

III. The Decision Below Leaves Standing a Gross Misapplication of This Court's Decision in Transportation Communication Employees Union v. Union Pacific R. Co., 385 U. S. 157 (1966).

The decision of the District Court, left standing by the Court below, is a gross misapplication of this Court's decision in the *Union Pacific* case.

In *Union Pacific*, the work formerly performed by two crafts (clerks and telegraphers) was performed by one man through technological innovation. The railroad assigned a clerk to operate the new machine. The telegraphers union claimed one of its men should be assigned to the job because it performed, in part, communication work. The claim was progressed to the Adjustment Board. The Board notified the Clerks' union of the pendency of the claim; the Clerks declined to participate but stated that if the jobs of its men should be threatened it would file a claim. 385 U. S. at 158-59. The Board decided the Telegraphers' claim solely on the basis of the Telegraphers' contract without considering any rights under the Clerks' contract, and held the Telegraphers' contract covered the job. This Court held that the Board in such situation must decide the Telegraphers' claim not solely on the basis of the Telegraphers' contract but also in the light of the Clerks' contract, whether or not the Clerks participated.

The District Court in this case, after holding for the Union on all issues raised by the parties, held that the *Union Pacific* case required the Board to give notice to the other unions that had contracts with the Frisco and to "review the other union contracts for the purpose of making an interpretation of the scope of all the contracts . . ." (R. 142; App. B, p. A-14; App. C, p. A-15). Such issue had not been raised or argued by any of the parties. Before issuing his opinion the District Judge called counsel for the parties and asked them what significance they thought this Court's *Union Pacific* opinion had to this case. Both sides replied that it was not applicable at all because no other union had ever claimed the right to perform the work, and the Frisco's sole contention was that the assignment of the work was a matter of managerial discretion (R. 146-49).

The facts here are *toto coelo* different from the facts in the *Union Pacific* case. No other craft claims the work. In the twelve claims involved in the awards, the Frisco assigned the work indiscriminately, to a yardmaster, to a clerk, to a member of the train crew, to a telegrapher, etc. No union other than the Telegraphers filed a claim. The claims involved no dispute then existing or agreement between the Frisco and any other union. Yet the holdings below require the Board to see if it can stir up some disputes. When this Court in *Union Pacific* held that the Board must consider "this entire dispute" (at 165), surely it referred to disputes then existing, not to disputes the Board might succeed in stirring up. The Adjustment Boards are established to resolve disputes, not to create them.

IV. The Refusal of the Court of Appeals to Grant the Joint Motion of All the Parties to Vacate the Judgment of the District Court and to Remand With Directions to Dismiss as Moot Is In Conflict With the Long-Established Practice of This Court.

Even if we assume that the judgment of the District Court would not ordinarily be appealable to the Court of Appeals, we believe it is stretching technicalities too far, and is unrealistic, to hold that the Court of Appeals did not have jurisdiction even to recognize that the underlying dispute had been settled and to make the appropriate disposition of the appeal in such situation. The appropriate disposition of an appeal when the underlying dispute is settled while the case is on appeal is not to decide the appeal but to vacate the judgment below and to remand the action to the trial court with a direction to dismiss as moot. *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39; *Duke Power Co. v. Greenwood County*, 299 U. S. 259, 267; *Brotherhood of Locomotive Firemen v. Toledo, P. & W. R. Co.*, 332 U. S. 748; *Securities & Exchange Commission v. Harrison*, 340 U. S. 908; *Howard v. United States*, 340 U. S. 898; *Barnes v. Akron, C. & Y. R. Co.*, 348 U. S. 893; *Hall v. Beals*, U. S. Sup. Ct., Oct. Term, 1969, No. 39, 90 S. Ct. 200, 38 Law Week 4006 (Nov. 24, 1969).

In the *Munsingwear* case, this Court said (at 39, fn. 2) that:

> "This has become the standard disposition in federal civil cases,"

citing a long line of cases.

In the *Duke Power Co.* case, the case became moot while pending on appeal because the contract which the plaintiff sought to enjoin had been superseded by another contract. This Court said (at 267):

> "We thus have a situation in which both courts below have failed to act in accordance with the standards of proper procedure. Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss."

In *Barnes v. Akron, C. & Y. R. Co.*, 348 U. S. 893, a petition for certiorari had been filed in this Court. The opposition to the petition consisted simply of an explanation that the underlying controversy had become moot. This Court granted the petition for a writ of certiorari and in the same order vacated the judgment of the court of appeals and remanded the case to the district court to dismiss it as moot. We believe that at the very least such an order should be entered here.

In *Gold v. Lomenzo*, ... F. 2d ..., decided January 22, 1970, by the 2d Circuit, 38 Law Week 2430, the District Court had denied a motion for the convening of a three judge Court and took action on the merits. The Court of Appeals for the Second Circuit thought that it did not have jurisdiction of the appeal, "the proper remedy being an application to the Supreme Court for a writ of mandamus." But, it held "that if a Court of Appeals does not exactly have jurisdiction of an appeal such as this, it has something sufficiently similar to enable it to reverse for the convening of a three judge court", and it took such action.

We suggest that *a fortiori*, even if the Court of Appeals in this case did not exactly have jurisdiction of the appeal, it had something sufficiently similar to enable it to reverse and remand for dismissal as moot. Such action would follow *a fortiori* from the *Lomenzo* case because, in that case the Second Circuit reversed and remanded for the District Court to decide the opposite of what it had

decided on the three judge issue, while in this case the Court below would have and should have reversed and remanded only for the purpose of enabling the District Court to recognize the existing changed situation and not to decide any issue because no justiciable issue then existed.

CONCLUSION

We submit that this Court should grant the writ either for the purpose of considering whether the holding of the Court below was correct or for the purpose of vacating the judgment of the Court below and remanding the case to the District Court with a direction to dismiss the action as moot.

Respectfully submitted

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APPENDIX.

APPENDIX A

STATUTES INVOLVED

Railway Labor Act

Section 3 First (p), (q), 45 USC 153 First (p), (q) (1970 Supp.)

Section 3 Second, 45 USC 153 Second (1970 Supp.)

Judicial Code, 28 USC, Section 1254, Section 1291

Section 3 First (p), Railway Labor Act

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties,[4] and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter

[4] (Public Law 456, 89th Cong.) (H. R. 706); (Approved June 20, 1966).

such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

Section 3 First (q), Railway Labor Act

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

Section 3 Second, Railway Labor Act, second paragraph

If written request is made upon an individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or of any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such

matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board. As amended June 20, 1966. Pub. L. 89-456, §§ 1, 2, 80 Stat. 208, 209.

28 United States Code (Judicial Code), §§ 1254, 1291

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX B

OPINION OF DISTRICT COURT

Memorandum

(Filed in U. S. District Court on Aug. 8, 1968)

The Transportation-Communication Employees Union and the Transportation-Communication Employees Union, Frisco System Division 32, filed suit under 28 U. S. C. 1337 against the St. Louis-San Francisco Railway Company seeking an injunction prohibiting the abolishment of certain employee job positions or in the alternative prohibiting the operation of certain computer equipment. St. Louis-San Francisco Railway Company (Frisco) filed a permissive counterclaim against the Transportation Communication Employees Union and the Transportation-Communication Employees Union, Frisco System Division 32 (Union), under the provisions of 45 U. S. C. 153, First, (q), seeking review of certain awards rendered by Public Law Board No. 34. With consent of the parties, the Union's complaint was dismissed without prejudice by Court order entered February 23, 1968. The dismissal did not effect the counterclaim filed by Frisco.

Pursuant to 45 U. S. C. 153, Second, Frisco and the Union entered into an agreement on May 16, 1967, establishing Public Law Board No. 34 to hear and decide seventy-four matters then in dispute between them. Public Law Board No. 34 (Board) proceeded to hear and render awards on the disputed matters submitted to it. Among the awards which it rendered were awards Nos. 18, 23, 24, 54, 55, 56, 57, 58, 59, 60, 61, and 72. Frisco alleges that the Board failed to comply with the provisions of the Railway Labor Act, 45 U. S. C. 151, et seq., in issuing the above twelve awards because it failed to confine it-

self to matters within the scope of its jurisdiction in the following respects:

(1) The Board failed to confine itself to the issues submitted to it for decision;

(2) The holding of the Board that the term "radio" was included within the scope rule of the labor agreement in issue constituted an unlawful change in the terms of a labor agreement which the Board had no jurisdiction to accomplish, changes in labor agreements in the railway industry being confined solely to the method and manner prescribed by the Railway Labor Act, 45 U. S. C., § 151, et seq.;

(3) The function of the Board delegated to it, i. e., interpretation and application of labor agreements, was exceeded when the Board rewrote the labor agreement to include jobs, functions and media within the scope rule not included by labor and management nor even contemplated by them when the scope rule was written.

(4) The Board completely ignored the provisions of law for the purpose of changing a labor agreement, i. e., 45 U. S. C. A., § 156, and substituted a law-making and agreement-writing function for the orderly processes enacted by Congress;

(5) The Board failed and refused to follow the dictates of statutes and governing court decisions in rendering said awards.

Frisco requested the Court to review the twelve awards and set them aside. The Union counterclaimed requesting the Court to enforce the awards under the provisions of 45 U. S. C. 153, First, (p), and to award attorney fees to the Union.

The Union made a motion for judgment on the pleading, which it later requested to be treated as a motion for

summary judgment. Frisco also made a motion for summary judgment.

Public Law Board No. 34 was created by agreement of the parties under the provisions of 45 U. S. C. 153, Second. That section of the Railway Labor Act provides that the awards of the boards created thereunder "shall be final and binding upon both parties to the dispute". The statute provides that "[c]ompliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board." The provisions of the Railway Labor Act relating to review by the United States district courts of orders and awards of the Adjustment Board (National Railroad Adjustment Board) are found in 45 U. S. C. 153, First, (p) and (q). The district courts are given jurisdiction to enforce the orders of the Adjustment Board and are granted a very limited jurisdiction to set aside such orders.

Research has failed to reveal a case in which an award of a board created under the provisions of 45 U. S. C. 153, Second, has been enforced or reviewed by the courts. The extent of this Court's jurisdiction under the statute to review the decisions of such boards must be determined. Chapter 45, U. S. C. 153, Second, on its face, seems to limit the jurisdiction of the United States district courts to enforcement of the awards of the boards. That section of the statute refers only to enforcement, it does not talk of the setting aside of an award as does 45 U. S. C. 153, First, (p) and (q). If the United States district courts have jurisdiction to do anything other than enforce such orders, it must arise by incorporation of all the provisions of 45 U. S. C. 153, First, (p) and (q), into 45 U. S. C. 153, Second, by the phrase "in the same man-

ner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

The Railway Labor Act, 24 U. S. C. 151, et seq., was amended in 1966. Among the provisions amended are those under consideration, 45 U. S. C. 153, First, (p) and (q), and 45 U. S. C. 153, Second. The legislative history of the 1966 amendments indicates conclusively that Congress intended for the United States district courts to have jurisdiction to review the awards of the boards created by agreement of the parties under 45 U. S. C. 153, Second, to the same extent that the district courts were granted jurisdiction to review orders of the Adjustment Board under 45 U. S. C. 153, First, (p) and (q). See S. Rep. No. 1201, 89th Cong., 2d Sess., June 2, 1966, 2 U. S. Cong. & Admin. News (1966), p. 2285 at 2289. See also **Dominquez v. National Airlines, Inc.**, 279 F. Supp. 392 (S. D. N. Y. 1968) (dictum).

The review by this Court of the awards issued by Public Law Board No. 34 is severely limited by statutory provisions and judicial precedent. The statute, 45 U. S. C. 153, First, (p) and (q), provides that an award of the Adjustment Board (and, therefore, of the boards created under 45 U. S. C. 153, Second) may be set aside only for: failure to comply with the provisions of chapter 45, U. S. C., failure of the order to conform, or confine itself, to matters within the scope of the board's jurisdiction; or for fraud or corruption by a member of the division making the order. The Supreme Court of the United States has held that district courts may only set aside an order if the board's decision is "wholly baseless and completely without reason." **Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965). The legislative history of the 1966 amendments to the Railway Labor Act shows that Congress intended that the courts were to continue

to have the power to set aside orders of the boards which were "actually and indisputedly without foundation in reason or fact." S. Rep. No. 1201, 89th Cong., 2d Sess., June 2, 1966, 2 U. S. Cong. & Admin. News (1966), p. 2285 at 2287.

One category of disputes submitted to the Board concerned twelve separate incidents in which Frisco assigned the transmission of radio communication to certain employees. The Union alleged that the Scope Rule of the collective bargaining agreement between Frisco and the Union had been violated by failure to assign such work to employees represented by it. The Union requested compensation for the employees to whom it alleged the work should have been assigned. The twelve awards under review by this Court were submitted to the Board by Frisco and by the Union for the Board's determination of whether the Scope Rule of the collective bargaining agreement included communications by "radio".

The Union contended that "radio" was included in the Scope Rule of the Telegraphers' Agreement. Frisco contended that "radio" was not included in the Scope Rule. The Board determined that the Scope Rule of the collective bargaining agreement between the parties did include "radio" communications.

The complaint of Frisco before this Court is that the Board exceeded its jurisdiction and rewrote the agreement between the parties when it determined that the Scope Rule included "radio". Frisco contends that the Union has accomplished a change in the collective bargaining agreement under the guise of processing a grievance. The Union and Frisco by agreement set up Local Board No. 34 to hear and decide certain disputes which were in existence between them. Twelve of these disputes involved the interpretation of the Scope Rule, and whether that rule included certain communications by radio. Frisco

stated in its statement to Public Law Board No. 34 in case No. 18 (award No. 18) that "[t]his is a Scope Rule dispute." The present position of Frisco is apparently that the Board had jurisdiction to determine that the Scope Rule did not cover the acts in question, but that the Board did not have jurisdiction to determine that the act in question was covered by the Scope Rule.

The essence of what Frisco is requesting of this Court is an interpretation of the provisions of the bargaining agreement between the parties. Frisco is requesting an interpretation that the Board exceeded its jurisdiction in that it wrongly interpreted the Scope Rule. The Court is, thus, requested to rule that the Board's interpretation of the Scope Rule was incorrect. This would not be a ruling on the jurisdiction of the Board, but a review of the merits have made it very clear that the courts are not to substitute their opinion for that of the Board's. The courts may set aside a decision of a board only if it is "wholly baseless and completely without reason." The decision must be "actually and indisputedly without foundation in reason or fact." A review of the decision of the Board in award No. 18 shows that it does not meet this test. The basis of the Board's decision in award No. 18 also serves as the foundation for the decisions in awards Nos. 23, 24, 54, 55, 56, 57, 58, 59, 60, 61, and 72.

Firsco cites several cases which discuss the difference between "major" disputes and "minor" disputes under the Railway Labor Act. The importance of this distinction is that the major disputes are not subject to the jurisdiction of the Adjustment Board created by 45 U. S. C. 153, First, and, hence, not proper subject matter for boards created under 45 U. S. C. 153, Second. The basic distinction between "major" disputes and "minor" disputes was drawn by the United States Supreme Court in **Elgin, J. & E. Ry. v. Burley**, 325 U. S. 711 (1945). The Court said in that case:

"[A 'major' dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

"[A 'minor' dispute], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

The difference between the interpretation of an existing agreement, and a change in the original intended basis of an agreement, as pointed out by the Eighth Circuit Court of Appeals in **Missouri-Illinois R. R. v. Order of Railway Conductors,** 322 F. 2d 793 (1963), is often a question of degree. The degree in this particular situation has already been decided by the United States Supreme Court. The essence of the dispute in this case is over work assignment. It is a dispute as to whether a certain employee must be utilized to perform a certain job with the use of radio. The Supreme Court, in **Transportation Union v. Union Pacific R. R.**, 385 U. S. 157 (1966), had before it a dispute over the assignment of certain jobs in connection with IBM machines. The railroad had assigned the jobs to members of the Clerks Union. The Telegraphers Union (the same Union as involved in this action) had sought compensation from the railroad for its members who had been idle because of the assignment to the clerks. The dispute between the railroad and the union was heard by the Adjustment Board under the provisions of 45 U. S. C. 153, First. The Supreme Court in review of the matter stated

that the Adjustment Board had jurisdiction to hear and decide controversies over the interpretation of the bargaining agreement between the railroad and the union as it relates to work assignment.

This decision by the Supreme Court must, of necessity, have included a determination that a dispute as to work assignments is a minor dispute. This Court is of the opinion that the attack of Frisco upon the jurisdiction of the Board because of the "major" versus "minor" distinction is disposed of by the Supreme Court's holding in **Transportation Union v. Union Pacific R. R.**, supra.

That case, however, raises a question which although not brought forward by either party to this suit must be answered by the Court. The Supreme Court noted that it is often assumed that a dispute over work assignments is a dispute between an employer and only one union, and, therefore, must be decided on the language of a single collective bargaining agreement considered in isolation from all other agreements. The Court rejected such reasoning, holding that "[i]n order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements . . ." The Board, said the Supreme Court, heard and decided the case without considering the railroad's liability to the clerks under its contract with them. The Court held that the Clerks Union was an indispensable party and directed that the cause be remanded to the Adjustment Board. The Adjustment Board was required to give the Clerks Union an opportunity to be heard and to resolve the entire dispute upon consideration of all the contracts the railroad had with any union "involved" in the overall dispute.

The awards of Public Law Board No. 34 did not consider the possibility that another union might have an interest in the determination that communication by radio in a particular instance comes within the Scope Rule of

the labor contract between Frisco and the Transportation-Communication Employees Union. Awards 18, 23, 24, 55, 56, 57, 58, and 72 state that a "Telegrapher" handled the particular communication in question. A "Telegrapher" is presumedly a member of the Transportation-Communication Employees Union, which is a party to this action. Awards 60 and 61 state that the communication in question was handled by a "Clerk". Award 59 states that the communication was handled by a "Yardmaster". Award 54 states that the communication was handled by a "member of train crew". The Court is unable to determine from the record the union membership of the individuals who handled the communications in awards 54, 59, 60, and 61.

This Court is of the opinion that the Board cannot make a proper determination of the matter unless it also reviews the contracts with Frisco of the other unions who may have an interest in this matter. See **Brotherhood of Railroad Signalmen v. Southern Ry.**, 380 F. 2d 59 (4th Cir. 1967), cert. denied, 389 U. S. 958 (1967). See also **Order of Railroad Telegraphers v. New Orleans, Texas & Mexico Ry.**, 229 F. 2d 59 (8th Cir. 1956), cert. denied, 350 U. S. 997 (1956).

These awards will be remanded to the Board for a determination of the other unions who may have an interest. After this determination has been made and the other unions have been given an opportunity to be heard, the Board shall then review the other union contracts for the purpose of making an interpretation of the scope of all the contracts and what effect they may have on these awards, if any.

Attorneys' fees will be denied.

Dated this 8th day of August, 1968.

/s/ James H. Meredith,
United States District Judge

APPENDIX C

JUDGMENT OF DISTRICT COURT

Judgment

(Filed in U. S. District Court on Aug. 8, 1968.)

A memorandum dated this day is hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered, Adjudged and Decreed that the cause be and the same is remanded to Public Law Board No. 34 for a further determination in accordance with the memorandum.

Dated this 8th day of August, 1968.

/s/ James H. Meredith
United States District Judge

APPENDIX D

ORDER DENYING MOTION TO AMEND JUDGMENT

Order

(Filed in U. S. District Court on Jan. 17, 1969)

This matter is pending on motion of the plaintiffs to amend the judgment of the Court dated August 8, 1968. The Court has been duly advised by briefs and oral argument and is of the opinion that the matters raised on the motion to amend are insufficient to cause the judgment to be amended. Accordingly,

It Is Hereby Ordered that the motion to amend the judgment be and the same is denied.

Dated this 16th day of January, 1969.

/s/ James H. Meredith
United States District Judge

APPENDIX E

OPINION OF COURT OF APPEALS AND DISSENT

Van Oosterhout, Chief Judge.

Plaintiffs, Transportation-Communication Employees Union and Transportation-Communication Employees Union, Frisco System Division 32 (TCU), have taken a timely appeal from judgment entered by the District Court on August 8, 1968, and from order of January 16, 1969, denying plaintiffs' motion to amend the judgment.

The threshold issue is whether either of such judgments are final decisions upon which an appeal will lie. We hold that neither of such judgments are final decisions and that plaintiffs' appeal must be dismissed for want of jurisdiction.

The issues involved and the factual background of this litigation are fairly stated in the trial court's memorandum opinion reported at 296 F. Supp. 507. It is sufficient for our present purposes to state that TCU sought enforcement of certain arbitration awards made by Public Board No. 34, which Board was created by agreement of the parties to this litigation pursuant to the provisions of 45 U. S. C. A. § 153, Second. The defendant railway has sought review of such awards. Each of the parties made motions for summary judgment. No ruling was made on such motions. The awards of the Public Board were neither enforced nor rejected, nor was the action dismissed. The court in its memorandum opinion, after ruling upon several of the issues raised, concluded its opinion as follows:

> "This Court is of the opinion that the Board cannot make a proper determination of the matter unless

it also reviews the contracts with Frisco of the other unions who may have an interest in this matter. . . .

"These awards will be remanded to the Board for a determination of the other unions who may have an interest. After this determination has been made and the other unions have been given an opportunity to be heard, the Board shall then review the other union contracts for the purpose of making an interpretation of the scope of all the contracts and what effect they may have on these awards, if any." 296 F. Supp. 507, 511.

The judgment entered August 8, 1968, reads:

"A memorandum dated this day is hereby incorporated in and made a part of this judgment.

"It is Hereby Ordered, Adjudged and Decreed that the cause be and the same is remanded to Public Law Board No. 34 for a further determination in accordance with the memorandum."

Subsequently on January 11, 1969, the trial court denied TCU's motion to amend the judgment to enforce the awards or in the alternative, to grant an evidentiary hearing upon the jurisdictional dispute issue. This appeal is from the judgment entries just described.

The trial court properly determined that it had jurisdiction over the controversy under 45 U. S. C. A. § 153, First, (p) and (q), and § 153, Second as amended. Included in § 153, First, is the following:

"The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. . . ."

See *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U. S. 157, 165, n. 4, for an interpretation of this provision.

Courts of Appeals have only such jurisdiction as is conferred by statute. The pertinent statute here involved, 28 U. S. C. A. § 1291, provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."[1]

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment." *Catlin v. United States*, 324 U. S. 229, 233. To like effect, see *Stewart v. Bishop*, 8 Cir., 403 F. 2d 674, 678; *Bohms v. Gardner*, 8 Cir., 381 F. 2d 283, 285; *Smith v. Sherman*, 8 Cir., 349 F. 2d 547, 551.

A remand order for further proceedings is not a final decision contemplated by § 1291. *Bohms v. Gardner*, supra; *Marshall v. Celebrezze*, 3 Cir., 351 F. 2d 467; *Mayersky v. Celebrezze*, 3 Cir., 353 F. 2d 89; *Stathatos v. Arnold Bernstein S. S. Corp.*, 2 Cir., 202 F. 2d 525.

We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action.

As pointed out by TCU, the court did in its memorandum opinion determine some issues, such as a holding that the dispute was a minor dispute and that the Arbitra-

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[1] This case does not fall within any of the provisions of § 1292(a) authorizing interlocutory appeals, nor have the provisions of § 1292(b) been utilized. Likewise the provisions of Rule 54(b), Fed. R. Civ. P., have not been followed.

tion Board had jurisdiction to decide the controversy over the interpretation of the bargaining agreement between TCU and the railroad. Such rulings are interlocutory and remain subject to revisions at any time before final decision and are reviewable only upon an appeal from final judgment. Rule 54 (b), Fed. R. Civ. P., *Stewart v. Bishop*, supra, p. 680 of 403 F. 2d; *Mesabi Iron Co. v. Reserve Mining Co.*, 8 Cir., 270 F. 2d 567, 569.

TCU urges that the trial court by its remand to the Board has lost jurisdiction of the case and that review of any subsequent proceedings by the Board could be instituted in another court. Whether or not the subsequent proceedings could be instituted in another court in our view has no material bearing upon the crucial issue of whether the orders appealed from are final decisions. As heretofore pointed out; the orders appealed from do not meet the finality standards set forth in the cases previously discussed.

Inasmuch as the appeal must be dismissed because the judgments appealed from lack finality, we do not have before us the issue of whether the interlocutory orders made by the trial court are correct and we express no view upon such issue.

The parties on December 5, 1969, filed joint suggestion of mootness and joint motion to vacate the judgment below and to remand the case to the District Court with direction to dismiss. Such suggestion was received subsequent to the preparation but before the filing of this opinion. Inasmuch as we have held that the court has acquired no jurisdiction over this appeal, it has no jurisdiction to enter the requested order to vacate the judgment and remand the case to the District Court with direction to dismiss.

The appeal is dismissed for want of jurisdiction.

Heaney, Circuit Judge, dissenting.

I respectfully dissent. The award of the Public Board was a proper one and should have been enforced by the District Court. 28 U. S. C. A., § 1291 should not be construed to prohibit a review of the District Court's order under the circumstances of this case.

Subsequent to the preparation of the majority opinion in this case, the parties resolve the basic dispute and filed a joint motion with this Court to vacate the judgment below and to remand the case to the District Court for directions to dismiss. I would grant the motion. As it is, the parties have the right to seek relief in the court below.

Because the basic dispute has been settled, I do not feel it necessary to expand on my views.

APPENDIX F

JUDGMENT OF COURT OF APPEALS.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed for want of jurisdiction.

December 19, 1969

APPENDIX G

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

On consideration of petition of appellants for rehearing in this cause, it is now here ordered by this Court that the petition for rehearing be and is hereby denied.

February 16, 1970